

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES MATTHEW MCKIBBEN,

Defendant and Appellant.

2d Crim. No. B205700
(Super. Ct. No. KA047123)
(Ventura County)

On July 10, 2000, a jury convicted appellant James Matthew McKibben of second degree robbery with personal use of a deadly weapon. (Pen. Code §§ 211, 12022, subd. (b)(1).)¹ The trial court sentenced appellant as a "second strike" offender to a total term in state prison of 12 years. It awarded appellant 120 days of presentence custody credit, consisting of 100 days of actual custody credits and 20 days of presentence conduct credits. Appellant's first appeal did not raise any sentencing issues. We affirmed the judgment in an unpublished opinion. (No. B145629, July 19, 2001.)

In April 2007, appellant requested that the trial court correct his sentence by awarding additional presentence custody and conduct credits. The motion was denied, as was a subsequent motion for reconsideration. Appellant now contends that he is entitled to an additional day of custody credit for a partial day that he spent in custody prior to his arraignment. He further contends that his conduct credits are not subject to the 20 percent

¹ All statutory references are to the Penal Code unless otherwise stated.

limitation imposed on Three Strikes offenders because the limitation does not apply to presentence credits and because second degree robbery was not listed as a violent felony until after his crime occurred. Respondent concedes the error. We will order the judgment modified to reflect that appellant has 151 days of presentence credit, consisting of 101 actual custody credits and 50 days of presentence conduct credits.

Facts

In January 2000, appellant robbed a Claremont gas station using a knife. Surveillance cameras photographed the crime. He was arrested the same day, carrying a large amount of cash and wearing the clothes shown in the surveillance photographs. The knife and other items depicted in the photographs were located in his car.

On March 14, 2000, prior to his arraignment, appellant spent part of the day in custody before being released on bail. He was free on bail until July 10, 2000, the date of his conviction, when he was remanded to custody. He remained in custody until his sentencing on October 17, 2000.

In April 2007, appellant moved to correct his sentence, contending that he was entitled to 50 percent good conduct credits, rather than the 20 percent awarded by the trial court. The trial court denied the motion. In January 2008, it denied appellant's motion for reconsideration of that order.

Discussion

An incorrect calculation of custody credits results in an unauthorized sentence that can be corrected at any time. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.) We conclude that appellant is entitled to one additional day of actual custody credit for the partial day he spent in custody on March 14, 2000. (*People v. King* (1994) 3 Cal.App.4th 882, 886.)

Appellant is also entitled to additional presentence conduct credits. At the sentencing hearing, the trial court determined that appellant's conduct credits were limited to 20 percent of his custody credits, "because it's a strike case" That determination was incorrect. The limitations imposed on conduct credits that may be awarded to Three Strikes defendant do not apply here.

Section 667, subdivision (c)(5) provides that good conduct credits awarded to a Three Strikes offender "shall not exceed one-fifth of the total term of imprisonment imposed" This limitation applies only to post sentence credits; it does not limit presentence credits. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 32.)

Section 2933.1 imposes a 15 percent limitation on conduct credits awarded to a person who is convicted of a violent felony within the meaning of section 667.5, subdivision (c). When appellant committed second degree robbery in January 2000, that offense was not listed as a violent felony in section 667.5. It was added to the list in March 2000, after voters approved Proposition 21. Thus, the 15 percent conduct credit limitation imposed by section 2933.1 does not apply to appellant. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907-908.) Appellant is therefore entitled to 50 percent conduct credits – or 50 days -- for the time he spent in local custody prior to sentencing.

Disposition

The judgment is modified to reflect that appellant has 151 days of presentence credits, consisting of 101 days in actual custody and 50 days in conduct credits. The trial court is directed to prepare and forward to the Department of Corrections an amended abstract of judgment reflecting the additional credits.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Daniel J. Buckley, Judge
Superior Court County of Los Angeles

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Xiomara Costello, Deputy Attorney General, for Plaintiff and Respondent.